IN THE

Supreme Court of the United States

OCTOBER TERM 1943

No.

I. DAVID COHEN and HUEL'S CHEMISTS, INC.,
Petitioners and Appellants below,

against

UNITED STATES OF AMERICA,
Respondent and Appellee below.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

1

Opinion of the Courts Below

There was no opinion rendered by the Trial Court relating to the within petitioners. The opinion of the Circuit Court below (R. 898-918), rendered on May 28, 1943, is still unreported.

2

Jurisdiction

The Court is respectfully referred to Item "2" of the petition, captioned "Jurisdiction to Review", which is herewith adopted and made a part of this brief under the question of jurisdiction.

3

Statement of the Case

Statement of the case has been made in the said petition, which is hereby adopted and made a part of this brief.

4

Constitution and Statutes Involved: The Sixth Amendment to the Constitution of the United States

The statutes and regulations involved are set forth in the appendix herein.

5

Specification of Errors

A. The Circuit Court erred in sustaining a conviction when it was improper to combine in one single count indictment and offer proof of three different conspiracies, all of which were different as to content, two of which were different as to personnel, one of which was a legal agreement, and two of which the Government failed to prove.

B. The Circuit Court erred in sustaining the conviction when there was harmful and fatal variance between the allegations and the proof and the variance between the opening statements of the Assistant United States Attorney and the proof adduced, because it tended to confuse the jury as to the issues.

C. The Circuit Court erred in sustaining the conviction because the Judge's charge was unintelligent, unenlightening and indirect, thereby preventing the jury from intelligently weighing the evidence in the case.

D. The Circuit Court erred in sustaining the conviction by the jury because the trial was unfair in that the Judge exhibited bias towards the Government and against the defendants. During the trial the Judge examined most of the Government's witnesses and cross-examined all of the defendants at length and their witnesses. He attacked the defendants and their counsel generally and evidenced to the jury his contempt for the defendants and their counsel.

E. The Circuit Court erred in sustaining the conviction because the evidence was not sufficient to connect the petitioners with the conspiracy.

POINT I

There was a fatal misjoinder of conspiracies and defendants and a variance between the allegations of the indictment and the proof.

When there is a misjoinder, as is conceded by the Circuit Court of Appeals in their opinion in this case, it reduces itself to the fact as to whether or not the misjoinder is fatal or merely harmful. There can be no question but that the misjoinder of three conspiracies here was fatal and so harmful to the petitioners herein so as to deprive them of a fair trial. Almost the entire ten days of trial was consumed with evidence by witnesses concerning the first two conspiracies which it is conceded the petitioners herein were not a part of. The cases wherein the facts were not as complicated as the case at bar, in which misjoinders were held to be fatal, are as follows:

McElroy v. *United States,* 164 U. S. 76.
Marcante v. *United States,* 49 Fed. (2nd) 156.
United States v. *Wills,* 36 Fed. (2nd) 855.
Tellman v. *United States,* 67 Fed. (2nd) 716.
United States v. *Silva,* 109 Fed. (2nd) 531.
Wyatt v. *United States,* 23 Fed. (2nd) 791.
United States v. *Smith,* 112 Fed. (2nd) 83, at page 85.

POINT II

The motion made by the defendants-appellants I. David Cohen and Huel's Chemists, Inc. to dismiss the indictment at the close of the Government's case and again at the close of all the evidence and to direct a verdict of acquittal should have been granted.

Huel's Chemists, Inc. sold a large quantity of lead and opium wash to Jack Liss, a co-defendant, at a reasonable profit of approximately 75¢ per gallon. All the sales were recorded in the books of the corporation, and the profits paid to the corporation. Appellant I. David Cohen testified at length that all the sales were made during the regular business hours of the drug store, and that large bottles of gallon goods of lead and opium wash were left conspicuously on the floor in the front portion of the store daily during these transactions, being observed by almost all of the customers of the drug store, and that all of the lead and opium wash was picked up at the store during the regular store hours and from the front portion of the store, so that all customers could observe this procedure.

There was no evidence that the appellant I. David Cohen was connected with the lead and opium wash either prior to the purchase of same by Huel's Chemists, Inc. or subsequent to the sale by Huel's Chemists, Inc. to Jack Liss.

There was absolutely no evidence that the lead and opium wash sold by Huel's Chemists, Inc. to Jack Liss was subsequently used for an unlawful purpose. It may very well be that the entire amount of the lead and opium wash purchased by Jack Liss from Huel's Chemists, Inc. is presently stored in a warehouse and in the possession of Jack Liss.

It is interesting to note that Towns & James and other leading drug jobbers who sold lead and opium wash to Huel's Chemists, Inc. in large quantities were not indicted or prosecuted in any way.

This Court said in the case of *United States* v. *Pioni*, 100 Fed. (2nd) 401, at page 403:

> "A 'conspiracy' imports a concert of purpose. * * * At times it seems to be supposed that, once some kind of criminal concert is established, all parties are liable for everything anyone of the original participants does, and even for what those do who join later. Nothing could be more untrue. Nobody is liable in conspiring except for the fair import of the concerted purpose or agreement as he understands it; if later comers change that, he is not liable for the change; his liability is limited to the common purposes while he remains in it."

Mere suspicion is not sufficient. The Government must prove beyond a reasonable doubt that a conspiracy existed.

> *Nosowitz* v. *United States*, 282 Fed. 575.
> *Reed* v. *United States*, 51 Fed. (2nd) 941.
> *Graceffo* v. *United States*, 46 Fed. (2nd) 852.

This Court said in the case of *United States* v. *Buchalter*, 88 Fed. (2nd) 625, at page 626:

> "Difficulty of proof is no substitute for actuality of proof, and an accused is presumed to be innocent and entitled to be acquitted until proven guilty as charged."

No conspiracy was proved between any of the other appellants. Assuming, however, for purposes of argument that a conspiracy had been proven between Jack Liss and others, I. David Cohen and Huel's Chemists, Inc. were definitely not a member of this conspiracy since no evidence was introduced to prove same. It is elementary that in order to have a conspiracy one must have a meeting of the minds with another individual and have knowledge of the major portions of the conspiracy.

> *United States* v. *Koch, et al.*, 113 Fed. (2nd) 982.

Clearly, if the Government proved a conspiracy between the other co-defendants herein, they failed to prove that the appellants I. David Cohen and Huel's Chemists, Inc. were a part of that conspiracy, in that I. David Cohen and Huel's Chemists, Inc. were conducting a lawful act.

In *United States* v. *Falcone,* 109 Fed. (2nd) 579, the Circuit Court of Appeals for the Second Circuit, in reversing a conviction for conspiracy against a wholesaler who supplied sugar in a conspiracy to operate a still, stated at page 581:

> "There are indeed instances of criminal liability of the same kind, where the law imposes punishment merely because the accused did not forbear to do that from which the wrong was likely to follow; but in prosecutions for conspiracy or abetting, his attitude towards the forbidden undertaking must be more positive. It is not enough that he does not forego a normal lawful activity, of the fruits of which he knows that others will make an unlawful use; he must in some sense promote their venture himself, make it his own, have a stake in its outcome. The distinction is especially important today when so many prosecutors seek to sweep within the drag-net of conspiracy all those who have been associated in any degree whatever with the main offenders. * * * We may agree that morally the defendants at bar should have refused to sell to illicit distillers, but both morally and legally to do so was toto coeto different from joining them in running the stills."

The Courts have repeatedly held that even the illegal purchase of a narcotic drug in and of itself would not substantiate a conviction in conspiracy; that it was necessary for the Government to prove a common purpose and an agreement to violate the Code.

Langer, et al. v. *United States,* 76 Fed. (2nd) 817.
Tinsley v. *United States,* 43 Fed. (2nd) 890.
Linde v. *United States,* 13 Fed. (2nd) 59.

The respondent in the Circuit Court of Appeals relied on the case of *Direct Sales Co., Inc.* v. *United States,* decided June 14, 1943, reported 131 F. (2nd) 835, to distinguish the case at bar from the *Falcone* case, *supra.* The distinction made is incorrect inasmuch as in the case of *Direct Sales Co., Inc.,* the commodity sold was morphine tablets, which in and of itself put the seller on notice, whereas in the case at bar the sale was not of a commodity which in and of itself would put a seller on notice. The lead and opium wash is used and sold extensively in small quantities by retail druggists, the same as Stoke's Expectorant and other remedies containing limited narcotic content. The extraction of morphine from lead and opium wash seemed so preposterous to the petitioner I. David Cohen that he was convinced of the truth of the statement by the defendant Liss that same was being used for the purposes of a liniment for race-horses.

POINT III

To purchase an exempt preparation from a retailer is not a crime, hence the appellants I. David Cohen and Huel's Chemists, Inc. cannot be guilty of a conspiracy for said sale.

There was no contention made by the prosecutor that it was illegal for anyone to purchase an exempt preparation from a pharmacist. The contention of the Government was that Huel's Chemists, Inc. failed to keep proper records of the sale pursuant to the rules and regulations of the Secretary of the Treasury of the United States.

Assuming for the purposes of argument that no proper records were kept by Huel's Chemists, Inc., and that that constituted a substantive crime, it is clear that one purchasing an exempt narcotic, to wit, lead and opium wash, or Stoke's Expectorant, or any other remedy which are considered exempt narcotics, would not be guilty of a crime.

The case of *Vannata* v. *United States,* 228 Fed. 424, held, if only a seller in a prohibition act was guilty of a crime and buyer was not guilty of a crime in buying, then the sale in and of itself could not be the subject of a conspiracy.

In the case at bar the sale of the lead and opium wash without keeping proper records may be a crime. However, the purchase of same could not possibly be a crime under the Code. Therefore, it would be impossible for appellants I. David Cohen or Huel's Chemists, Inc. to be guilty of a conspiracy in the sale of a limited narcotic preparation.

POINT IV

Appellants I. David Cohen and Huel's Chemists, Inc. were not accorded a fair and impartial trial as required by the Sixth Amendment of the Constitution.

Throughout the trial the Court prohibited counsel for I. David Cohen and Huel's Chemists, Inc. from exercising his free will in acting on behalf of the said defendants-appellants.

The Judge insisted that counsel for said appellants fail to make any objections unless the name of I. David Cohen was mentioned. It is clear that in a conspiracy case the proving of a complete conspiracy is necessary in order to sustain a conviction, and any attempt made by counsel to protect the interests of his client to disprove the complete conspiracy was certainly justified (see fols. 1667-1670).

Throughout the record the Court continuously lead witnesses for the prosecution in obtaining testimony for and on behalf of the Government.

The entire cross-examination of appellant I. David Cohen by the Assistant United States Attorney was directed toward impeaching the witness in reference to his ability as a chemist, after he had testified on three or four occasions that he was not a qualified chemist and did not re-

member his chemistry from college (fols. 2046-2109), consisting of twenty printed pages in the record. This tended to degrade the appellant I. David Cohen in the eyes of the jury on matters wherein he had failed to testify on direct examination, and was definitely improper cross-examination. Same was allowed after repeated objections on the part of counsel for said appellant.

It is difficult for the record to disclose exactly the demeanor of the Court in trying the case, as it is barren of the innuendoes and the facial expressions and the intonations of the voice of the Court. However, one present at the trial obtained the impression throughout the trial that the Court held all of the defendants in scorn and that they were to be disbelieved in anything that they said.

The Assistant United States Attorney, in his summation, continuously referred to the failure of witnesses to procure character witnesses. This was detrimental and prejudicial, as there is no duty for a defendant to produce character witnesses.

The late case of *Viereck* v. *United States,* in the October Term of 1942, in quoting from the *Berger* case (*Berger* v. *U. S.,* 295 U. S. 78, 88), stated thusly:

> "The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor—indeed, he should do so. But while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one."

The following is an indication of the demeanor of the Assistant United States Attorney and the Court (fols. 1068-1071):

"Mr. Buchman: The tide of fortune might turn in my favor eventually.

The Court: All right. Go ahead.

Mr. Cannella: You mean the tide is not in your favor now?

Mr. Meadow: Your Honor, I move for a mistrial. I just heard the United States Attorney say that the tide was not in our favor in front of the jury, and I move for a mistrial, and ask for a ruling on it.

Mr. Cannella: I did not say that.

The Court: Disregard all remarks of lawyers. Motion denied.

Mr. Meadow: I respectfully except to your Honor's ruling in reference to the mistrial, and want this for the purpose of the record.

The Court: I heard you say that.

That defendants Al Fox and Max Fox do not join in that motion.

The Court: Go ahead.

Mr. Meadow: I want this for the purposes of the record.

The Court: Everything you say is on the record. Your motion is denied.

Mr. Meadow: Has he got the statement there with reference to the United States Attorney?

The Court: Sit down, please. You have been heard and I have disposed of it. You are interrupting the cross-examination."

The Court refused to accept the requests to charge, after the summation had been commenced by the other appellants but prior to the time that summation was commenced by appellants I. David Cohen and Huel's Chemists, Inc. (fols. 2405-2412).

CONCLUSION

It is, therefore, respectfully submitted that a writ o certiorari should be granted in this case.

Respectfully submitted,

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